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THE INITIATIVE AND REFERENDUM

REMARKS

OF

HON. FRANK E. GOVE

IN THE

COLORADO STATE SENATE

AUGUST 19, 1910

PRESENTED BY MR. GUGGENHEIM

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THE INITIATIVE AND REFERENDUM.

The senate having under consideration a bill (H. B. No. 6, by Mr. Skinner and Mr. Helbig) for an act to submit to the qualified voters of the State of Colorado an amendment to section 1 of Article V of the constitution of the State of Colorado, providing for the initiative and referendum—

Mr. Gove said:

Mr. President, I was opposed to this measure at the last session of the general assembly. I believed it to be inconsistent with our established institutions. In actual operation I could regard it as productive only of harm to the people of this State. These conclusions, reached after but little consideration, in the disorder and haste of an active session, have been confirmed by a deliberate and more careful examination of the subject. I am to-day profoundly impressed with the fundamental danger of this pretended reform. It is subversive of representative government. To my mind, its advocates are contemplating a long step backward, not forward, in the application of principles of sound government as accepted and applied in this country since its foundation.

Those who understand what is meant by the initiative and referendum are comparatively few in number. Of those who have a more or less hazy impression of its general purport, a few only have read this or any other similar bill. Still fewer have given the subject a single hour of careful consideration, not to say close analysis. Not one man in a thousand can intelligently discuss its history or the principles upon which it is based. Not one man in ten thousand can foresee with certainty the ultimate result of its adoption upon the essential features of our existing form of government. Yet there are those who peremptorily demand that this body close its eyes and rush this measure to final passage, irrespective of its merits or defects, and heedless of the possible, and, as I see it, certain, injurious consequences to the people of this State and the system of government under which we live. A great man long ago asserted that, to form a good system of government for a single city or State, however limited as to territory or inconsiderable as to numbers, requires the strongest efforts of human genius. I submit that lesser minds should long deliberate before attacking the very vitals of a system which certainly had its origin in human genius, and which, generally speaking, has produced better results than any other yet devised.

But we are told by some upon whom no responsibility for our action rests, that we have no right to deliberate upon, much less decide, the grave questions of legislative policy involved in this and other measures. We have been instructed by certain members of the press, by the chief executive of the State, and by a number of partisan political conventions and others, that it is our duty, irrespective of our personal

views and convictions, to enact this measure into law. Every pressure which ingenuity could conceive has been brought to bear to coerce the members of this body to do their duty, not as they, but as others, see it.

For myself, I protest against all attempted interference by the executive department of the State with the affairs committed by the constitution to this department. I am opposed to and resent all political, partisan, caucus, and other attempts to improperly influence, not to say compel, a legislator to cast a vote contrary to his best judgment at the time such vote is cast. Prior to the election in 1908, when it was sought to secure my pledge to vote for what have since been so frequently characterized as platform measures, I declined to become so obligated. I said, in writing, that I would "vote for or against any specific law according as it commends or fails to commend itself to my best judgment in view of the information then available and the conditions then existing." That position seems to have been regarded as correct by the people of this city. If it was correct then, it is correct now. In any event, I have sought to pursue here the conduct outlined then, and I shall continue so to do. If those who sent me here believe that my position is incorrect, they are under no obligation to send me here again. It is the subject of the deepest regret to me that my convictions have compelled me to act otherwise than in accordance with what I know is the sincere desire of friends for whom I must always retain the highest regard, but I believe the position which I have assumed to be correct, and I can not change it.

The members of this legislative body should represent their State first, their political party afterwards. Party expediency and partisan considerations should influence them no more than personal attachments or the importunities of their friends, however honest and sincere. No manufactured emergency, nor any real or imaginary vicissitude of partisan policy, should be permitted to control our action here. If upon any given measure I believe my political party to be right, I shall support that measure. If, in my opinion, the passage of a given measure will operate to the temporary advantage of my party, but to its ultimate undoing, and at all events to the disadvantage of the State, I will oppose it.

The legislatures of this and other States, and of the Nation, should and must be free to deliberate upon and decide all questions legitimately within their constitutional sphere. Corporate and financial interests and so-called boss dictation should be ignored, no less than the unreasonable importunities and undue pressure, direct and indirect, of overzealous partisans, ambitious politicians, seekers for public office and well-meaning reformers. It is just this sort of thing to which the advocates of many intended reforms properly protest, and yet they themselves are chargeable with the same indiscretions when their measures are presented here for consideration. A legislator should be permitted to act deliberately, calmly, and, above all else, independently.

If my conception of the rights and duties of a legislator differ from those of others, they are at least by no means novel. When, in 1850, the Legislature of Massachusetts attempted to instruct Mr. Webster, then United States Senator from that State, upon his duty relative to the subject of slavery, he replied that there was no public

man who required instruction more than he, or who required information more than he, or desired it more heartily; but he did not like to have it in too imperative a shape. He saw no propriety in one set of public servants giving instructions and reading lectures to another set of public servants. Each was responsible to his own master, his constituents. And he bluntly added: "If the legislatures of the States do not like that opinion, they have a good deal more power to put it down than I have to uphold it."

Still further back, we find the classic address of Edmund Burke to his constituents in the city of Bristol. Replying to a suggestion that he, as their representative in Parliament, was bound by the coercive authority of their instructions, he said:

> Certainly, gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect; their businesss unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfaction, to theirs; and above all, ever and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. * * *
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> My worthy colleague says his will ought to be subservient to yours. If that be all, the thing is innocent. If government were a matter of will upon any side, yours, without question, ought to be superior. But government and legislation are matters of reason and judgment, and not of inclination, and what sort of reason is that in which the determination precedes the discussion; in which one set of men deliberate and another decide; and where those who form the conclusion are perhaps 300 miles distant from those who hear the arguments?
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> To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear, and which he ought always most seriously to consider. But authoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, to vote and to argue for, though contrary to the clearest conviction of his judgment and conscience, these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our Constitution.

In 1870, Senator Lamar, later one of the venerable justices of the Supreme Court of the United States, received instructions from his constituents in the State of Mississippi to vote for the Bland bill. His reply was as firm as it was touching:

> Mr. President, between those resolutions and my convictions there is a great gulf. I can not pass it. Of my love to the State of Mississippi I will not speak; my life alone can tell it. My gratitude for all the honor her people have done me, no words can express. I am best proving it by doing to-day what I think their true interests and their character require me to do. During my life in that State it has been my privilege to assist in the education of more than one generation of her youth, to have given impulse to wave after wave of the young manhood that has passed into the troubled sea of her social and political life. Upon them I have endeavored to impress that truth was better than falsehood, honesty better than policy, courage better than cowardice. To-day my lessons confront me. To-day I must be true or false, honest or cunning, faithful or unfaithful to my people. Even in the hour of this legislative displeasure and disapprobation, I can not vote as these resolutions direct. I can not and will not shirk the responsibility which my position imposes. My duty, as I see it, I will do, and I will vote against the bill.

With respect to my conduct here, I am content to adopt the reasoning and conclusions of such examples. Notwithstanding the demands which have been made upon us, in spite of those who regard this body as incapable of forming an intelligent judgment and powerless to execute any independent will, I intend to present, for such consideration as they may deserve, the reasons which compel me to regard this measure as unworthy of support.

To begin with, who are its exponents? What class or classes of men are actively advocating the application of the doctrines of the initiative and referendum to the government of this State? Is there anything in their learning, experience, attainments, or general standing in the world of thought which inclines one in favor of the fundamental change of Government which they urge?

First, a body of enthusiastic, sincere, and unselfish men, mistaken, as I am bound to believe, and for the most part untrained and inexperienced in the science of government, but none the less honest and patriotic citizens, who believe that in extending the principle of the Angla-Saxon folkmote and the New England town-meeting to a large population, scattered over a wide territory, will be found a cure for all, or the large part, of the ills with which the body politic is said to be afflicted. There is much to be admired in the conduct of these men, however much it may be desired that they were employed in the promulgation of a principle of government more sane and sound and ultimately safe. Solely because of the high motives which actuate such men, their views are entitled to respectful consideration.

The determined and unselfish, however ill-advised, endeavor of these people to accomplish something for the benefit of their State and Nation has at last aroused the attention and enlisted the support of two other classes of less worthy men. The faddist, the extremist, the enthusiast, the fanatic, the man of one idea, who has been unable to secure any substantial following, now sees, or thinks he sees, in this reform great possibilities for the advancement of the interests of his hobby. Only permit him to get his scheme, which no deliberative assembly can be induced to seriously consider, before the people for a moment and he can perhaps succeed. And if perchance at the first attempt the people are sufficiently alert to defeat his plan, he may try again with better fortune. We were better engaged in an effort to get rid of this sort of public pest than in considering measures calculated to advance the interests which he advocates.

And then the demagogue, with ear to the political ground, eyes to the public gallery, and key to the back door of some editorial chamber, has observed the soothing effect of "initiative and referendum," when oft repeated, upon his unsuspecting following. He prates of the rights of the people, demonstrates that in them lies all power, and waves them on to follow him, their guardian and guide, into the land of political freedom, where the people will rule because in them rightfully lies all political power.

Of course the people are the source of all political power, but, to quote from another:

> He who arrogates to himself any particular merit or virtue by pretending great solicitude for the people, by constantly proclaiming this self-evident doctrine, is a demagogue. There is no great merit in loudly asserting what everybody knows to be true. If anyone really believes that there is anyone to deny that the people must rule in this country, he dreams dreams.

It is not my purpose to consume time in an effort to unmask the motives or analyze the logic of such men. It was long ago discovered that "it is a waste of lather to shave an ass." I am unable to discern anything in the character, training, experience, or performance of any of the advocates of this measure to commend it to our attention. Nevertheless, what say the honest and unselfish men who are devoting their lives to teaching the doctrines under consideration?

We are told by the advocates of this particular measure that the representatives of the people in the legislative department of this State are unworthy of confidence and can not be trusted to do that which is for the best interests of the people. It is then insisted that by the enactment of this law all will be well, because the affirmative acts of a corrupt or ignorant legislature can be negatived, and its failure or refusal to enact desirable laws overcome, by the people themselves.

I am not prepared to admit that this or any other general assembly is or has been corrupt or heedless of the interests of the State. That there have been corrupt and worthless individual men sent here is doubtless true. But it will require more than mere irresponsible asser tion to convince me that the general assemblies of this State have not, as a rule, performed their legislative duty as they saw it. Some ridiculous, many bad, and a few vicious bills have been enacted into law in this State. Many hundreds of measures, every one of which had its enthusiastic supporters, have been rejected. But it is neither just nor honorable for those who recognize the faults of statutes passed, or who grieve for those rejected, to carelessly attribute either result to the wholesale bad faith of those now here or those who have preceded us.

This much of the premise upon which the friends of this bill base their arguments I will concede: By far too many of the representatives which the people send to general assemblies of this and other States are unfit, or rather unprepared, for such service. Never more than to-day have I appreciated my own incapacity and lack of training for the performance of the work which we are called upon to do. But the fault lies with the people themselves. If a few individuals and groups of individuals will cease their indiscriminate suspicion and abuse of their public officials; if the press will state more fact and less fiction relative to their conduct; if the electors of this State will wake up to a realizing sense of the fact that constitutional lawyers can not devise a government so perfect as to automatically run itself and wholly relieve them of the responsibilities of citizenship; then will more men of intelligence, training, experience, sound judgment, and capacity for public affairs be found, and be willing to be found, in this assembly, and more satisfactory results will be obtained.

But, even if it be assumed that the premises of the friends of this bill are correct, it is demonstrable that the remedy which they propose is not only based upon an erroneous principle of government, but must of necessity be productive of nothing but harm.

The framers of the Federal Constitution, which, in so far as its basic principles are concerned, has been followed by every State in the Union, were thoroughly equipped for the work which they were destined to perform. The varied experience of some, the extensive reading and broad culture of others, and the sound judgment of all qualified them for the important duties which devolved upon them. They were familiar with the character and history of all forms of government which had gone before. They knew, however, but two general forms of government—monarchical and purely democratic. They were sorely perplexed. A monarchical form of government was regarded as neither desirable for nor desired by the people of the 13 original States. The ancient and medieval democracies, with the most minute workings of which certain members of the convention were remarkably familiar, had been acknowledged failures and had

passed from view. By some providential fortune, the convention chose for us a middle ground and, practically for the first time in all history, conceived the idea and adopted for the United States the plan of a representative democracy.

The idea that the voting population of this State should, as a whole, have an opportunity, at short intervals, to approve or reject matters of proposed legislation, assumes the practicability of a pure democracy, as distinguished from the representative democracy which was established by the Federal Constitution and approved by the constitution of this State.

In the New York convention which ratified the Federal Constitution, Hamilton said of a pure democracy:

> It has been observed by an honorable gentleman that a pure democracy, if it were practicable, would be the most perfect government. Experience has proven that no proposition in politics is more false than this. The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. Their very character was tyranny; their figure deformity. When they assembled, the field of debate presented an ungovernable mob, not only incapable of deliberation, but prepared for every enormity. In these assemblies, the enemies of the people brought forward their plans of ambition systematically. They were opposed by their enemies of another party, and it became a matter of contingency whether the people subjected themselves to be led blindly by one tyrant or by another.

In one of his letters, Jefferson wrote:

> Modern times have discovered the only device by which equal rights of men can be secured, to wit, government by the people, acting not in person, but by representatives chosen by themselves.

And again:

> A government is republican in proportion as every member comprising it has his equal voice in directing its concerns—not indeed in person, which would be impracticable beyond the limits of a city or small township, but by representatives chosen by himself and responsible to him at short periods.

So insisted Daniel Webster, in his great argument before the Supreme Court of the United States in Luther *v.* Borden; so spoke Woodrow Wilson within six months; and so says practically every recognized authority of standing in this or other times.

The individual citizen should have the utmost possible to do with the government of his State and the administration of its affairs. But the capacity, power, and function of the individual citizen are, and must of necessity always be, limited. Except in the most simple of purely local affairs, he must, upon principle, rely for satisfactory results upon others. With respect to matters of state-wide importance, the citizens en masse never have been and never can be able to act wisely. I make no distinction between the poor and the rich, the educated and those less fortunate. Thus acting, they are incapable of forming a wise judgment on the larger, the complex, and the sometimes technical questions which arise in any department of the State. Such matters must, if they are to be wisely determined, be determined by representatives of the whole people—men who know or will take the time to ascertain the facts in a special case, who can confer with other men of different views, who can deliberate with men representing opposing interests, and who can, after such consultation and deliberation, participate in the expression of a calm, dispassionate judgment. The best judgment of the individual, I care not who he may be, is of little value. That the individual,

however intelligent he may be, shall be permitted to pass final judgment on any public question to which he has not given, and can not give, special study and attention, is not in accordance with any sound theory of democratic government.

In the legislative, no less than in the executive and judicial, departments of our government, the people must rely upon the good faith, intelligence, and judgment of their representatives. Any attempt to secure better results than can be secured under the present system, by permitting the individual citizen to express himself directly on matters of legislation, will, and must, defeat itself. If it be true that the people either can not, as some argue, or will not, as I insist, take sufficient interest in the already too numerous political contests and popular elections to select as their representatives men who will be a credit to the State and to themselves—if the people either can not or will not conscientiously perform their duties as citizens and electors in the careful selection of men—it is too much to expect that they can or will exercise any better faith or better judgment in the far more difficult matter of the selection of measures.

The theory of the friends of this bill, and the principle upon which it is based, are fallacious. They are inconsistent with the American conception of representative government as applied to legislative affairs, and were carefully considered, ultimately denounced as worthless, and discarded in practice more than a century ago.

The measure under consideration would be ridiculous, were it not of such serious moment. Should this constitutional amendment be adopted, it is fair to assume that the electors of this State will be called upon, year after year, theoretically to consider and actually to vote upon a constantly increasing mass of legislation. And this without any formal discussion, without serious deliberation, with no opportunity for debate, without information other than such as can be gathered from the newspapers, and wholly without the right or power to amend any measures submitted, even to the extent of correcting typographical errors. Every man with a hobby, every body of men with an intended reform, every organization with some ax to grind, every special interest with some selfish end in view, can initiate and submit for popular approval a statute to subserve the end desired.

A further suggestion seems not to have received the attention which its importance merits. It should be remembered that it is now proposed to confer the power upon 8 per cent of those who voted at the last general election to submit for popular approval not only statutes, but amendments to the constitution as well. Not only so, but whereas under existing law, no more than six articles of the constitution of the State can be amended at one time; under the plan proposed amendments may be submitted to every article of the constitution at the same time.

To one who has given such matters careful consideration, this is a most dangerous modification of prevailing practice. To many who have not investigated the subject, it appears as an experiment which should be adopted only with the gravest caution. The constitutions of this and other States have heretofore been regarded as something more basic, more stable, more sacred perhaps, than a mere statute. There are many, very many, of our people who still regard the con-

stitution of the State as something not to be hastily or easily or frequently changed. And yet the advocates of the pending amendment propose to place the constitution upon exactly the same plane as the statute book. They propose to allow 8 per cent of the electors, and upon but four months' notice, to submit for popular approval amendments to every article of the constitution—in effect, to submit an entirely new constitution—and to secure the adoption thereof in exactly the same way as if it were a statute of the most trivial character.

The failure to distinguish between the general principles of government announced by all State constitutions and the less important statute law does not disclose a high order of statesmanship on the part of the exponents of this measure, and the inevitable tendency of the adoption of such a scheme to destroy this distinction in the popular mind is an evil of perhaps indefinite but obviously grave import.

But it is urged that, theory and the experience of history to the contrary, the initiative and referendum does actually work successfully, notably in Switzerland and Oregon.

The most authentic information which I have been able to obtain does indicate that in all except two or three of the larger cantons of Switzerland the system is productive of reasonably satisfactory results. But it by no means follows that it would do so under conditions existing here. Not to mention possible distinctions between the origin, character, and temperament of the people of Switzerland and those of this State or this country, a glance at other controlling conditions emphasizes this conclusion.

Switzerland contains 15,965 square miles; Colorado, 104,000 square miles. This State would, in so far as area alone is concerned, make seven Switzerlands. Switzerland could be placed within the exterior lines of three counties of this State. On the other hand, Switzerland has a population of 3,325,000—over 200 per square mile; Colorado has a population of perhaps 800,000—less than 8 per square mile. The electors of Switzerland live in the closest touch with each other; those of this State are widely scattered.

But in any truly suggestive comparison the basis should be the canton, not the entire federation, because it is the canton which peculiarly exemplifies the workings of the initiative and referendum in its governmental affairs. Fourteen of the 25 cantons of Switzerland contain less than 400 square miles; 4 contain less than 100 square miles—less than twice the area comprised within the city of Denver. The largest canton of Switzerland has approximately the area of Pueblo County. One canton has a population of 590,000; one, of 430,000; three have from 200,000 to 300,000; ten have between 100,000 and 200,000; and ten have less than 70,000. The largest voting population in any Swiss canton is approximately 116,000; the average is about 30,000. In six, all the electors assemble at stated times in mass meeting, discuss and deliberate upon affairs of local interest, and vote by a show of hands.

These facts, if they indicate anything at all, tend to show that the initiative and referendum is feasible and admirably adapted for small and thickly settled communities. The conditions prevailing in the cantons of Switzerland are so closely analogous to those which rendered efficient the New England town-meeting, and our own local

home rule in cities and towns, as to demonstrate a pure democracy to be, at least in theory, an almost ideal system of government for both. Where every citizen can take a personal part in the details of public affairs, there not only can be no rational objection to the principle of the initiative and referendum, but, as a practical working governmental device, it may be conceded to be exceedingly efficient. But where the population is large or is scattered over a wide area, where the interests of the people are diverse and conflicting, the plan is simply unworkable. Switzerland affords no proof that its system of pure democracy is suitable for, or can ever be adapted to, conditions here. Especially is this true when it is remembered that, even in that country, no uniform plan has been adopted, certain cantons having the initiative, some the referendum, some both, and one neither.

In any view of the conclusions based upon the experience of Switzerland in this connection are purely negative. The most that can be said is that the results attained by the initiative and referendum are apparently satisfactory under the conditions there existing, and it would appear that they should be satisfactory under similar conditions existing elsewhere. But these conditions do not exist in any part of the United States, and it can not, therefore, be assumed that the scheme under consideration has any proper place in the governmental system of this or any other American State.

An analysis of the actual results of the initiative and referendum in Oregon is more interesting and instructive. Positive, rather than merely negative, conclusions can be reached based upon the experience of the people of that State.

Oregon has a voting population of 110,000. The people are notably progressive and intelligent. If the principle of the initiative and referendum can properly find lodgment in any American State, it should be successfully applied here. But what are the results? I assume that Senator Bourne has correctly stated the facts. In 1904 two laws were submitted to the people for adoption or rejection. In 1906 11 laws were so submitted. In 1908 the people passed upon 19 separate measures. In 1910 the electors of that State, in addition to casting their vote for their public officers, will have the privilege and pleasure of voting upon the merits of 32 distinct statutes and constitutional amendments. And the end is not yet. Any system of government which imposes upon the voter the burden and responsibility of such a duty should receive the most careful scrutiny before it is incorporated into the constitution of this State. Every reasonable man must know, and does know, that the electorate of that State, or of any other State, can not thoroughly consider the many questions submitted and intelligently cast its ballot under such circumstances.

And what has the initiative and referendum actually accomplished for the people of Oregon? By a vote of the people, the legislature has been authorized to fix the pay of the State printer. By a vote of the people, the date of the general election has been changed from June to November. By a like proceeding, sheriffs have bee given charge of county prisoners. At a general election the people have passed a law, initiated by those engaged in catching salmon with a wheel, which put out of business those who caught them with a net; and the selfsame people, at the same election, passed another law,

initiated by those engaged in catching salmon with a net, which put out of business those who caught them with a wheel. And the governor of the State, to the end that its citizens may continue to pursue one of their most productive occupations, has attempted to arbitrarily suspend the operation of both these laws until the legislature can afford relief.

Another measure which was deemed of sufficient importance to submit to the entire people of the State of Oregon requires an indictment to be found by a grand jury; and by another very important measure a new county was created, thus affording new territory for the practical operation of the principles of direct legislation. I have been spared an inspection of the titles of the thirty-two measures which will be submitted for the prayerful consideration of the people of Oregon this fall, but I doubt not that the importance of some of them will take high rank with those which have been enumerated.

With respect to the practical value of the referendum, as distinguished from the initiative, it may be noted that the people of Oregon, in their legislative wisdom, rejected a measure calculated to expedite pending legal controversies by increasing the number of judges of the supreme court from three to five. The people have even nullified a law permitting cities to regulate their local theaters. By a popular vote, a bill intended to increase the salary of the legislators of the State from $120 per year to $400 per annum was defeated. And, strangest of all, twice in two years the good people of Oregon have refused to permit women to vote, and a third opportunity is to be afforded them to pass a proper law upon this subject.

These are some of the practical results of the initiative and referendum in the State of Oregon; and it is a matter of no surprise that there is already a large and constantly increasing body of its citizens who are agitating its early abolition.

A further significant illustration of the practical working of one element of this pretended reform is afforded by the experience of our own State with the referendum upon amendments to the constitution. The more experimental and more dangerous principle of the initiative aside, what can be learned right here at home as to the practicability and desirability of the referendum?

The people of this State since its admission have had submitted to them for their approval or rejection 31 constitutional amendments. Twenty-four have been adopted; seven have been rejected. The total absence of any discrimination among the electors respecting such constitutional measures, and the impossibility of any proper appreciation of the importance of the subjects submitted to them, is evidenced by the fact that, as a rule, when several amendments have been submitted at one election, they have been either all passed or all rejected, and by almost the same, and in some instances identically the same, vote. In 1904 four amendments were submitted. All were adopted. Three of them received exactly 20,915 favorable and 12,880 unfavorable votes. In 1884 three amendments were submitted. All were adopted, and by almost the same result. In 1886 three amendments were adopted by favorable votes of 2,806, 2,617, and 2,678, as against 740, 759, and 789 in the negative.

The practical identity of such results demonstrates one of two things: Either the measures submitted appealed with the same force

to almost exactly the same number of voters—an unreasonable conclusion, because, of several measures, one, if the matter received any proper consideration, must of necessity have appeared more meritorious than others; or the people who voted upon them did not—or, as I believe, can not—adequately understand matters of that sort. The absurdity of having the people vote upon the wisdom of conferring upon a court the power to issue writs of habeas corpus, quo warranto, mandamus, and certiorari, is manifest: yet this is exactly what has been once done in this State. This amendment—a very desirable one—was adopted; but I can not believe that the greater part of those who voted in favor of it had any conception of what they were doing.

Another startling fact is disclosed by an analysis of the referendum vote of the people of this State upon constitutional amendments. Several changes in our constitution have been made by a vote of less than 6 per cent of the total vote cast at the election. In one instance, what would certainly seem to have been a very desirable amendment was defeated by a vote of 2,303 as against 692—a total vote upon the amendment of exactly 5 per cent of the total vote cast. On the average throughout the years, less than 30 per cent of the people voting have expressed themselves at all upon even so important an issue as an amendment to the constitution. I submit that this is not "government by the people," nor will an extension of this system promote "government by the people." It is government by a minority—nay, it is government by a minority of a minority. This so-called reform makes of the constitution a football to be kicked only by the voters, who are but a minority of the people, and by such a minority of this minority as is sufficiently interested to participate in the game.

If the elector either will not or can not, on rare occasions, take sufficient interest in proposed modifications of the fundamental law of his State to familiarize himself with and vote upon the questions involved, it can not be expected that he will or can do any better when confronted with a multitude of statutory laws submitted for his approval or disapproval.

One further significant fact in this connection: Of the seven constitutional amendments which have been defeated by the people of this State four had in view improvements in the judicial system of the State. Three were intended to secure the payment of outstanding and honest debts of the State. The fact that all the amendments which have been defeated are included in these two classes demonstrates to my mind that the people as a whole can not, in the nature of things, appreciate the character and importance of measures of this character; for I will not believe that the people of this State really prefer an inferior or inefficient system of courts, or are disposed to repudiate their honest obligations.

We have been told that the measure under consideration has been drafted with the greatest care; that it says exactly what it means, and means exactly what it says. But the friends of the bill have already in part receded from this confident position. They no longer proclaim with so great assurance that its adoption will place unlimited power in the hands of the people as it was intended to do. A cursory reading of the constitution, as it will appear if this amendment is adopted, will disclose something more: If it does not go so

far in some respects, it is more far reaching in others than its advocates ever dreamed.

It is now conceded that the power of the people reserved by this proposed amendment, to enact laws, is at least limited by that clause of the Federal Constitution which provides that no State shall pass any ex post facto law or law impairing the obligation of contracts. It is obviously no less true that the power of the people to legislate, even if this amendment is adopted, will be also limited by at least seven provisions of the constitution of this State left unimpaired by this measure. It provides—and, even if this amendment be adopted, will continue to provide—that: no law shall be passed impairing the freedom of speech (II, 10); no bill shall be passed containing more than one subject (V, 21); no law shall be amended, or the provisions thereof extended, except it be published at length (V, 24); no bill shall be passed allowing any extra compensation to any public officer after the services have been rendered or contract made (V, 28); no law shall extend the term of any public officer, nor increase or diminish his salary, after his election (V, 30); the public funds shall not be expended for denominational or sectarian purposes (V, 34; IX, 7).

Attention is directed to these constitutional limitations upon the legislative power of the people under this new scheme, not that they are in anywise objectionable, but as illustrating the danger of accepting too seriously the confident assertions of our new-found leaders respecting the legal effect of what they have prepared and submitted as a sure guide to governmental perfection.

Contrary to the intention of the framers of this measure, the power of the people to enact laws is, I suspect, also limited by not less than 20 constitutional provisions conferring the express power upon, and making it the express duty of, the general assembly to enact laws of certain specified kinds. Upon the ratification of this amendment, the constitution of the State will provide that the people reserve the power to propose laws; but that the general assembly shall provide for the raising of all revenues (V, 31); divide the State into congressional districts (V, 44); provide for the enumeration of the inhabitants of the State (V, 45); fix the terms of the courts (VI, 20); pass laws to secure the purity of elections (VII, 11); designate the courts and judges by whom election contests shall be tried (VII, 12); submit to the people questions of changing the seat of government (VIII, 2, 3); provide for the establishment and maintenance of public schools (IX, 2); provide for the sale of public lands (IX, 10); provide for an annual tax to defray the expenses of the State government (X, 2); provide for the organization and classification of cities and towns (XIV, 13); make provision whereby cities and towns may elect to be governed by general law (XIV, 14); provide for the organization of corporations (XV, 2); provide reasonable regulations controlling telegraph lines (XV, 13); provide for the regulation of mines (XVI, 2); provide by law that boards of county commissioners shall have power to establish rates for the use of water (XVI, 8); provide for the safe-keeping of public arms, military records, etc. (XVII, 4); pass homestead and exemption laws (XVIII, 1); prohibit the importation of adulterated liquors (XVIII, 5); enact laws to prevent the destruction of forests

(XVIII, 6); pass all laws necessary to carry into effect the provisions of the constitution (schedule, 4).

The power of the general assembly with respect to the foregoing classes of legislation is, and will continue to be, exclusive, notwithstanding the power reserved by this amendment to the people. While the people may legislate under the provisions of this bill, it does not seek to modify, much less repeal, the many constitutional mandates to the effect that on certain matters the general assembly shall have exclusive legislative authority.

But if, contrary to the intention of those who drafted this measure, the power of the people to legislate is in some respects restricted, it is not limited with reference to many subjects as to which all history and experience teach it should be limited.

Since written constitutions have been known the people have always, and wisely, limited themselves as to the methods by which they should act, and the bounds beyond which they will themselves not go. At no time and in no American State has it been deemed wise that laws of certain kinds should be passed at all. Certain classes of legislation have been uniformly prohibited by the fundamental law of every State. The constitution of this State is no exception. Therein the people declared that the general assembly shall pass no law retrospective in its operation, or making any irrevocable grant of special privileges, franchises, or immunities (II, 11). Again, the general assembly shall pass no local or special laws, granting divorce; or changing county seats; or regulating county affairs; or changing the rules of evidence in any trial; or declaring any person of age; or giving effect to informal or invalid deeds; or providing for the management of public schools; or remitting fines, penalties, and forfeitures; or increasing the allowances of public officers; or changing the law of descent; or granting any corporation the right to lay down railroad tracks; or granting to any corporation any special or exclusive privilege, immunity, or franchise (V, 25). Elsewhere the general assembly is prohibited from prescribing textbooks for the public schools (IX, 16). The general assembly is prohibited from imposing taxes for county or city purposes (X, 3). The general assembly is prohibited from authorizing any expenditure of public funds unless a levy has been made to raise the funds to be expended (X, 16). The general assembly is prohibited from passing a law for the benefit of any railroad or other corporation, retrospective in its operation, or which imposes on the State or county a new liability in respect to transactions already passed (XV, 12). The general assembly is prohibited from authorizing lotteries or gift enterprises for any purpose (XVIII, 2).

The Constitution is—and, even if this measure shall be made a part of it, will continue to be—specific on these matters. Time and time again the general assembly is prohibited from enacting laws of the classes mentioned. But the people, under this proposed measure, may pass such laws. The right to do so is expressly reserved.

This is a dangerous letting down of the bars. It is no answer to say that there is and will be no disposition on the part of the people to exercise this power. In times of peace, in the absence of public excitement, when all, including agitators and demagogues, are busy with their legitimate personal affairs, this no doubt is true. But the power reserved to the people to enact such prohibited measures will still remain.

The constitutional prohibitions against the general assembly passing such laws was intended to safeguard the State, under all possible conditions, against the enactment of such laws at all. They have always been regarded, and are, unwise from whatever source they emanate. And the people, no more by direction than through their representatives indirectly, should be allowed, or, better, should not allow themselves, to put them on the statute book.

Notwithstanding the care with which this bill is said to have been prepared, it is obvious that there are many considerations which have not received the attention which the far-reaching importance of the subject requires.

One further point remains. In my opinion the measure is repugnant to the Federal Constitution.

Section 4, Article V, of the Federal Constitution, so far as here applicable, is as follows:

> The United States shall guarantee to every State in this Union a republican form of government.

Section 4 of the enabling act of this State provides for a meeting of the members of the constitutional convention; that, after organizing, they shall declare, on behalf of the people of the Territory, that they adopt the Constitution of the United States, and that the convention shall then be authorized to form a constitution and State government, this proviso being added:

> *Provided,* That the constitution shall be republican in form * * * and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

The duty of the United States to guarantee to every State in the Union a republican form of government carries with it the correlative duty on the part of the State to establish and maintain a government republican in form.

The requirement of the enabling act, that the constitution of Colorado should be republican in form, applied not only to the first constitution but to every amendment thereto which might be adopted. It is a continuing obligation resting upon the people of the State, whether the original constitution remains in force, whether it be amended, or whether a new constitution be substituted for the old.

If this proposed amendment to the constitution establishes a form of government, in whole or in part, not republican in form, it is repugnant to the constitutional and congressional requirements, and invalid.

At the threshold, therefore, of this inquiry, it becomes important to determine what is the meaning of the expression "republican in form," as applied to a government or a constitution.

The convention which framed and submitted the Federal Constitution for the adoption or rejection of the States did not loosely use words and phrases, but advisedly employed only such as would correctly and technically express the meaning intended to be conveyed.

The convention was influenced and guided by, or its work subjected to, the piercing criticism of such commanding intellects as Washington, Hamilton, Jefferson, Marshall, Franklin, and Adams—men whose names are inseparably woven into the world's history, and a knowledge of whose utterances and achievements is essential to an intelligent study of modern government.

As before suggested, the purpose of the convention was to form a government intermediate between a monarchy and a pure democracy—a government resting upon a popular basis, but so far departing from the primitive form of a pure democracy as to delegate the exercise of sovereign powers to independent but coordinate departments. Such a form of government was correctly and technically designated as republican. It was neither a monarchy, an aristocracy, nor, as the term was then understood and applied, a democracy.

One of the main features incorporated into the Federal Constitution, the division of the Government into executive, legislative, and judicial departments, was recognized as essential to the creation and maintenance of a government republican in form, and that Constitution stands as the best exposition of the meaning of the term when found in the document itself or in acts of Congress, whose existence was provided for and whose powers were defined by that instrument.

Not only was there thus created a precedent for a government in its essential features republican in form, but the Constitution recognized the existence of and necessity for the three fundamental and coordinate branches of the government in each State. Time and time again the Federal Constitution expressly refers to the executive, legislative, and judical departments of the several States.

Any State which, by its constitution, omits either of these departments, or makes a radical departure from the recognized power and authority of any department, is necessarily out of harmony with the form of government recognized by the Federal Constitution as republican.

Judicial interpretation of the expression "republican in form" is rare, but the few cases found sustain the definition or construction which I have here advanced. In Minor *v.* Happersett (21 Wall., 162–175) the following language is used by the Supreme Court of the United States:

> The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.
>
> The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the States to provide. Thus, we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

An examination of the forms of government existing in the 13 original States discloses that all which had formally adopted constitutions prior to the time of the submission of the Federal Constitution provided for governments having the three separate and independent departments, and that those which were still acting under charters from the Crown subsequently adopted constitutions and organized governments in exact conformity with the requirement that they should be republican in form.

In In re Duncan (139 U. S., 449–461) Chief Justice Fuller uses this language:

> By the Constitution a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws, in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

And, referring to the earlier case of Luther *v.* Borden, the Chief Justice uses this language:

> Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people.

In L. M. & B. R. Co. *v.* Geiger (34 Ind., 185, 196, 197), the following language occurs:

> The third article of our constitution provides that "The powers of the Government are divided into three separate departments—the legislative; the executive, including the administrative; and the judicial—and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."
>
> The same division of powers exists in the Federal Constitution, and in most, if not all, of the State constitutions, and is essential to the maintenance of a republican form of government.

In Langenberg *v.* Decker (131 Ind., 471, 478), this language is employed:

> The division of powers made by our constitution exists in the Federal Constitution and in most, if not all, of the State constitutions. The powers of these departments are not merely equal; they are exclusive in respect to the duties assigned to each, and they are absolutely independent of each other. The encroachment of one of these departments upon the other is watched with jealous care, and is generally promptly resisted, for the observance of this division is essential to the maintenance of the republican form of government.

From the foregoing the conclusion appears inevitable that, to create and maintain a government republican in form, there must be and remain the three great departments, legislative, executive, and judicial, through which, in their respective spheres, the sovereign powers of the people are exercised. If one department be omitted, the form is not republican.

In 1876 the people of Colorado, in harmony with the thought prevailing at the time of the adoption of the Federal Constitution, and with the spirit which uninterruptedly continued until distrust of legislative bodies suggested the scheme of the initiative and referendum, adopted our present constitution.

Pursuant to the requirement of Congress that the constitution should be republican in form and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence, it was declared, in Article III, that "the powers of the government of this State are divided into three distinct departments, the legislative, executive, and judicial;" and, in Article V, that "the legislative power shall be vested in the general assembly, which shall consist of a senate and a house of representatives, both to be elected by the people."

To the legislative department has been, and must always be, delegated the power of enacting laws. If this department be restricted or limited by the retention of its functions to be exercised directly by the people, the government is not republican in form, but sui generis—an illogical admixture of a republic and a pure democracy.

An amendment to the State constitution providing that the people of the State en masse or by a majority vote should exercise judicial functions would impress the most casual thinker as being revolutionary in character, contrary to the spirit of republican institutions, and without validity. Such an amendment would constitute no greater inroad upon recognized, established, guaranteed, and required forms than an amendment providing that the people in the same manner might exercise legislative powers.

A legislative department of the State, with full delegation of legislative powers, being essential to a republican form of government, those powers can not be surrendered or delegated by it; nor can they be resumed or retained and exercised by the people en masse or by a majority vote without infringing the Federal Constitution or violating the mandate of the enabling act requiring that the State constitution shall be republican in form.

It has not been my purpose to consider the particular form in which this measure is now presented, nor to unduly prolong the discussion by an analysis of its details. From my viewpoint it is enough that the entire scheme of the initiative and referendum is wrong in principle. It is subversive of representative government. It has no place in the system which has been adopted for our Nation and State. It can lead only to trouble and confusion; and, in my opinion, in the last analysis, it will be pronounced repugnant to the Federal Constitution. Because of these considerations, and because of my convictions relative to the duties of a representative of the people upon this floor, I shall vote against the measure in any form in which it may be presented.

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